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PROPOSED MARYLAND JURY INSTRUCTION ON CROSS-RACIAL IDENTIFICATION

David E. Aaronson*

Introduction

This article discusses the merits of a specific jury instruction on cross-racial identification for use in criminal cases when eyewitness identification is the central or critical issue, little or no corroborating evidence is presented, and the circumstances raise doubts about the reliability of the identification.

A proposed instruction developed for use in Maryland is as follows:

In this case, the defendant, _____ (*insert name*), is of a different race than _____ (*insert name of identifying witness*), the witness who has identified [him][her]. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness' original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.

You may also consider whether there are other factors present in this case which overcome any such difficulty of identification. [For example, you may conclude that the witness had sufficient contacts with members of the defendant's race that [he][she] would not have greater difficulty in making a reliable identification.]¹

This instruction is intended to supplement standard jury instructions identifying factors to be considered in evaluating eyewitness identifications including: (1) the opportunity for the witness to observe the offense and the person committing the offense, including the length of time the witness had to observe the person committing the offense, the distance between the witness and the person committing the offense, and the lighting conditions at the time; (2) the witness' state of mind at the time of the offense; (3) the witness' degree of attention to the person during the commission of the offense; (4) whether the witness knew or had seen the person before; and (5) the accuracy of any prior description of the person given by the witness.

The jury is also instructed that it may consider the circumstances of any earlier identification that occurred out of court, such as: (1) the length of time between the offense and the identification; (2) any statements made by the police officer(s) prior to or during the identification procedure; (3) the state of mind of the witness at the time of the identification; and (4) any misidentification by the witness or failure to identify the defendant. In addition, jurors are instructed to consider the

credibility of the identifying witness, including any interest or bias the witness may have in the outcome of a case and other factors affecting credibility.

The Need for a Jury Instruction on Cross-Racial Identification

The purpose of a specific jury instruction on cross-racial identification is to permit juries to consider the increased possibility of misidentification in determining whether or not there is sufficient evidence of guilt.

Jury instructions specifically tailored to safeguard against cross-racial identification errors would serve to enhance fairness and confidence in the criminal justice system, especially in situations where there is little or no corroborating evidence to substantiate the eyewitness identifications. In appropriate cases, instructions addressing the enhanced risk of cross-racial misidentification should be given after the general instructions regarding identification and credibility of witnesses so that jurors have the means to evaluate the accuracy of the identification.

Research shows that persons of one racial or ethnic group have more difficulty distinguishing among individual faces of another group than among faces of their own group.² An inaccurate identification due to the so-called "own race" effect may result in higher wrongful conviction rates when defendants are of different races than the witnesses who identify them.³ Studies show that persons who primarily interact within their own racial group, especially if they are in the majority, will better perceive and process the subtlety of facial features of persons within their own racial group than persons of other racial groups.⁴

For example, during a recent misdemeanor trial in a Maryland state courthouse, an eyewitness to a criminal offense identified a student attorney in the American University Washington College of Law's Criminal Justice Clinic, rather than the defendant, as the perpetrator of the crime. The eyewitness, a Hispanic man, made a statement prior to trial identifying the defendant, an African American man, as the perpetrator and explained that he had known the defendant for three years.

When asked to identify the perpetrator at trial, however, he pointed to the African American law student representing the defendant, resulting in an immediate dismissal of the charges.⁵ Unfortunately, cross-racial courtroom misidentifications are rarely as obvious as the one in this example.

Traditional trial protections of suppression hearings, *voir dire*, cross-examination of witnesses, closing arguments, and jury instructions on the credibility of witnesses and evaluation of eyewitness testimony do not adequately address the special recognition impairments often present in cross-racial eyewitness identifications. Abshire and Bornstein state that "[m]uch of the reason for juries' erroneous convictions based on faulty eyewitness identifications is that jurors are not very

sensitive to the factors that determine eyewitness accuracy.”⁶ The additional protection of a cross-racial jury instruction is needed, as stated by Johnson, “because the own-race effect strongly influences the accuracy of identification, because that influence is not understood by the average juror, because cross-examination cannot reveal its effects, and because jurors are unlikely to discuss racial factors freely without some authorization to do so.”⁷

Race, Ethnicity and Cross-Racial Identification Studies

Although eyewitness identifications are often reliable and persuasive evidence, thirty years of social science research and the contributions of the Innocence Project, a national organization dedicated to exonerating wrongfully convicted persons through DNA testing, have shown that erroneous eyewitness identifications are the single greatest cause of wrongful convictions nationwide. Approximately three-quarters of the more than 200 wrongful convictions in the United States overturned through DNA testing resulted from eyewitness misidentifications.⁸ Of the seventy-seven percent of cases, where race is known, forty-eight percent of the cases involved cross-racial eyewitness identifications.⁹

Why do persons of one racial group generally have greater difficulty identifying persons of another racial group than among faces of their own group? Loftus, Doyle and Dysart state:

Many possible explanations of the cross-racial effects have been offered; for example, the effects are due to differential experience with members of a different race, to prejudicial attitudes about members of different races, or to different modes of processing faces of another race. These have been thoroughly reviewed. The best explanation seems to be that people make more mistakes on a cross-racial identification for a number of reasons, including, but not limited to, the amount of contact with persons from other racial groups, the amount of attention paid to other race persons, and time spent encoding features that are less useful in discriminating people from other groups (footnotes omitted).¹⁰

A classic study by psychologists Roy Malpass and Jerome Kravitz compared recognition and memory of identification of persons among students at Howard University, a predominantly black university, and the University of Illinois, a predominantly white university. Photographs of black and white males were shown to the students and later the subjects were tested. Subjects recognized faces of their own race better than faces of the other race. A striking finding was that white subjects from the University of Illinois made two to three times as many false identifications when attempting to identify black faces of students from Howard University than when attempting to identify white faces.¹¹

Since the study by Malpass and Kravitz, many other

studies “have been conducted with slightly different results from one study to another but with a generally consistent pattern.”¹² The studies show not only a greater difficulty in recognizing faces of another race, but members of one race also have more difficulty reconstructing faces of other races.¹³

Studies and collected data indicate that this “own race” effect applies across racial groups: Caucasians, African Americans, Asian Americans, and Latino Americans are better able to recognize members of their own race than members of another race. A recent ABA report concluded: “Cross-racial identifications are generally inferior to within-race identifications.”¹⁴

For example, one study found that both Japanese and Chinese Americans are significantly better at recognizing Asian American faces than African American faces.¹⁵ They are also better at recognizing African American faces than Caucasian faces.¹⁶ Additionally, the study reported that Japanese Americans are only marginally better at recognizing Japanese

American faces than Chinese Americans faces, and the reverse is equally consistent for Chinese Americans recognizing Japanese American faces.¹⁷

The research on cross-ethnicity identification is less clear-cut. At least one state supreme court, authorizing a cross-racial jury instruction in certain situations, has held that studies on *cross-ethnicity* identification—as opposed to studies of *cross-racial* identification—do not provide enough support to warrant a specific jury instruction.¹⁸

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Federal Jurisdictions Permitting the Use of a Cross-Racial Identification Jury Instruction

In *United States v. Telfaire*,¹⁹ the D.C. Circuit affirmed the defendant’s conviction when the trial court refused, in the absence of a request, to give a special instruction on identification finding that the witness had an adequate opportunity to observe the defendant.²⁰ The court went on to create a model identification instruction to deal with the shortcomings in the identification process, though this instruction omitted consideration of the races of the defendant and the witness.²¹ To address this deficiency, Chief Judge David L. Bazelon in a concurring opinion stressed the problems surrounding cross-racial identifications and advocated for the addition of the following language to the court’s model identification instruction:

In this case the identifying witness is of a different race than the defendant. In the experience of many it is more difficult to identify members of a different race than members of one’s own. If this is also your own experience, you may consider it in evaluating the witness’s testimony. You must also consider, of course, whether there are other factors present in this case which overcome any such difficulty of identification. For example, you may conclude that the witness has had sufficient contacts with members of the defendant’s race that he would not have greater difficulty in making a reliable identification.²²

Most circuits have approved the *Telfaire* recommended model identification instruction, but not the specific instruction on cross-racial identification in Judge Bazelon's concurring opinion. Although many circuits agree that the recommended model identification instruction may or should be given when identification is the key issue in the case and the identification testimony is uncertain, only some circuits *require* the instruction to be given in these circumstances.²⁴

Maryland Case Law Addressing the Use of a Cross-Racial Identification Jury Instruction

In 2004, the Maryland intermediate appellate court, the Court of Special Appeals, in *Smith v. State*,²⁵ affirmed the conviction of the defendant, an African American man, of attempted robbery and related offenses, based on the identification and testimony of the victim, a Caucasian woman. At trial, the defendant's counsel requested Chief Judge Bazelon's jury instruction on cross-racial identification from his concurring opinion in *Telfaire*.²⁶ The trial court refused to give the instruction, instead instructing the jury on the shortcomings of eyewitness identification in general.²⁷

In reviewing the trial record, the Court of Special Appeals noted that the victim had significant opportunity to observe the defendant at the time of the crime and gave the police a detailed description immediately afterwards.²⁸ At trial, the victim stated that she was "extremely good with faces."²⁹ The victim, an artist and teacher, lived in a mixed-race neighborhood and had the ability to focus on facial features. The jury heard the victim cross-examined and could find her credible as an observer of human faces.³⁰ The court held that the evidence did not indicate that the victim had problems distinguishing the faces of different African Americans and, therefore, the trial court did not abuse its discretion both in refusing to give a specific jury instruction on cross-racial identification and in rejecting the defendant's claim that the cross-racial identification required special emphasis in closing argument.³¹

Maryland's highest court, the Court of Appeals, reviewing the decision of the Court of Special Appeals, agreed that the trial court did not abuse its discretion in this case, but given another set of facts, the court stated that it may be appropriate for a trial court to give an instruction on cross-racial identification.³² The court held, however, that the trial court erred in prohibiting defense counsel from commenting on the cross-racial identification in its closing argument, stating that "[g]enerally, counsel has the right to make any comment or argument that is warranted by the evidence proved or the inferences therefrom."³³ Because the victim's identification of the defendant was anchored in her "enhanced ability" to identify faces, the defense counsel's request to discuss the problems that arise as a result of cross-racial identification should have been allowed.³⁴

State Jurisdictions Permitting the Use of a Cross-Racial Jury Instruction

A few state appellate courts either require or authorize a cross-racial identification jury instruction, including

California, Utah, New Jersey, and Massachusetts.

California

California Jury Instruction No. 2.92 includes the cross-racial instruction in a short "laundry list" of items that may be considered. The California jury instruction states:

Eyewitness testimony has been received in this trial for the purposes of identifying the defendant as the perpetrator of the crime[s] charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:

. . . The cross racial [or ethnic] nature of the identification. . . .³⁵

*People v. Palmer*³⁶ is an example of a case in which the California Court of Appeals reversed a robbery conviction based solely on eyewitness identifications of uncertain reliability.³⁷ The court held on retrial that the defendant would be entitled to an instruction that included, as one factor, the cross-racial nature of the identifications.³⁸

Utah

In 1986 in *State v. Long*, the Utah Supreme Court abandoned the discretionary approach and mandated trial courts to give the instruction whenever eyewitness identification is a central issue and is requested by the defense.³⁹ The Utah court stated that a well-constructed cautionary jury instruction would pinpoint identification as a central issue and highlight the factors that bear on its reliability.⁴⁰ Furthermore, a cautionary instruction must "respect the jury's function and strike a reasonable balance between protecting the innocent and convicting the guilty."⁴¹ The *Long* court noted that a proper instruction sensitizes the jury to external and internal or subjective factors that empirical research has shown to be important in determining the accuracy of eyewitness identifications.⁴² The Utah Supreme Court indicated that the following instruction would "certainly satisfy our expressed concerns about the need for cautionary instructions."⁴³

. . . You should also consider whether the witness is of a different race than the criminal actor. Identification by a person of a different race may be less reliable than identification by a person of the same race.⁴⁴

New Jersey

The New Jersey instruction provides more specificity than the California instruction in explaining to jurors the potential dangers of cross-racial identifications. New Jersey permits the jury to consider the following specific factors in the appropriate case:

The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether

that fact might have had an impact on the accuracy of the witness' original perception, and/or the accuracy of the subsequent identification.

You should consider that in ordinary human experience, people may have greater difficulty in identifying members of a different race.⁴⁵

*State v. Cromedy*⁴⁶ is an example of a Supreme Court of New Jersey case in which use of the suggested cross-racial instruction should be considered. In August 1992, an African American man raped a Caucasian woman. The police were notified and received a description from the victim of an African American male in his late 20s to early 30s, about five-feet, five-inches tall, with a medium build, mustache, and unkempt hair.⁴⁷ Eight months later, the victim saw an African American male across the street from her whom she thought was her attacker. She studied his face and gait as he walked past her, and then went home to call the police.⁴⁸ Fifteen minutes later, the defendant was picked up by the police, and the victim identified him in a show-up—a process of identification usually occurring shortly after arrest in which the accused is usually the only person observed by the victim—as both the man she saw on the street and her attacker. During the trial, the state did not present any forensic evidence linking the defendant to the offenses.⁴⁹ Despite these circumstances, a jury found the defendant guilty of first-degree aggravated sexual assault.⁵⁰

In *Cromedy*, the Supreme Court of New Jersey rejected the state's argument that a cross-racial identification instruction should not be required unless there is a demonstrated substantial agreement in the relevant scientific community that cross-racial identification is significantly impaired.⁵¹ In addition, the court recognized that unrestricted use of the cross-racial charge could be counter-productive, and it suggested that an appropriate instruction would carefully delineate the context in which the jury is permitted to consider racial differences.⁵² The court reversed the conviction and held that “a cross-racial instruction should be given only when, as in the present case, identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability.”⁵³

New Jersey has also permitted cross-racial jury instructions in other cases.⁵⁴ However, the Supreme Court of New Jersey recently held that the *Cromedy* cross-racial jury instruction is inapplicable when a cross-ethnic identification is involved.⁵⁵ The *Romero* court found “insufficient data to support the conclusion that, as a matter of due process, people of the same race but different ethnicity . . . require a *Cromedy* instruction whenever they are identified by someone of a different ethnicity.”⁵⁶

Massachusetts

Although Massachusetts does not require the instruction to be given, the Appeals Court of Massachusetts has held that “a judge should consider a request for such an instruction

with a measure of favorable intention to grant it.”⁵⁷ Massachusetts courts have approved of the following instruction:

[You] may consider the fact of any cross-racial identification and whether the identification by a person of different race from the defendant may be less reliable than identification by a person of the same race.⁵⁸

How Proposed Model Instruction Compares to Federal and State Instructions

The proposed Maryland model cross-racial jury instruction draws upon the language of various federal and state instructions, especially the jury instructions in *Telfaire* and *Cromedy*. This instruction should serve as a model for state courts because it properly explains the cross-racial identification theory, instructs the jury that it may discount the validity of a cross-racial identification, and permits the jury to trust that an identification was correct.

Similar to *Telfaire* and *Cromedy* and unlike the California instruction, the proposed instruction explains the meaning of the cross-racial identification theory: “You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.”⁵⁹ In addition, similar to *Cromedy* but unlike the *Telfaire* instruction, the proposed instruction explains to jurors that the cross-racial nature of the identification may affect the witness' original perception or the accuracy of a later identification.

The proposed model instruction uses objective language similar to *Cromedy* by focusing on ordinary human experience: “You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.”⁶⁰ This contrasts with the language of the *Telfaire* instruction, which takes a subjective approach advising jurors to consider the validity of a cross-racial identification based on their personal beliefs about this theory: “In the experience of many it is more difficult to identify members of a different race than members of one's own. If this is also your experience, you may consider it in evaluating the witness's testimony.”⁶¹ The proposed instruction's use of objective language permits a juror to discount a cross-racial identification, regardless of his or her personal experiences with identifying persons of a different race.

Finally, the proposed model instruction advises the jury that it is free to consider factors that may reduce the likelihood of a cross-racial misidentification, similar to the *Telfaire* instruction, but unlike the New Jersey, Utah, and Massachusetts instructions. The proposed instruction states: “You may also consider whether there are other factors present in this case which overcome any such difficulty of identification. (For

example, you may conclude that the witness had sufficient contacts with members of the defendant's race that [he][she] would not have greater difficulty in making a reliable identification.)"⁶² This language is important to an identification instruction because jurors need to be made aware of the relevance of factors other than race in determining the validity of the cross-racial identification; for example, the opportunity of the witness to observe the suspect and the accuracy and degree of detail of the description. Also, this language invites jurors to focus on the witness's contacts and experience with members of the defendant's race.

Arguments In Opposition to Use of Cross-Racial Identification Jury Instruction

Courts have denied cross-racial jury instructions on the basis that jurors are adequately equipped to consider eyewitness testimony in light of their own personal experiences and common sense.⁶³ Courts have also denied the instruction based on the argument that it "raises that proposition to the level of a rule of law, which implies a degree of certainty that social science rarely achieves and comes perilously close to a comment on the evidence contrary to the constitutional restriction."⁶⁴ Judges in many states, unlike the federal court system, are not permitted to comment to the jury about the evidence.

In *Cromedy*, the Supreme Court of New Jersey suggested that a cross-racial instruction should be given only when identification is a critical issue in the case and when the identification is not corroborated by other additional evidence that gives it independent reliability.⁶⁵

Opponents of the instruction also argue that a cross-racial instruction injects the issue of race into a case where it does not belong and confuses the jury. Their concern is that whenever the witness is of a different race or ethnic group, the defendant may bring in race as an issue. Merely a difference in race between the defendant and the identifying witness, however, does not require that the instruction be given.

Other Issues Relating to Cross-Racial Identification Jury Instructions

Should a Preliminary Showing be Required of an Increased Risk of Error Due to Cross-Racial Factors?

Should courts require defense counsel to elicit information from witnesses to determine the level of contact and familiarity of the witness with persons of the defendant's race as a condition for giving the suggested jury instruction? When requesting the cross-racial identification instruction, some courts have required a preliminary showing of risk that the witness may be mistaken due to cross-racial factors.⁶⁶ In *Miller v. State*,⁶⁷ the Indiana Court of Appeals held that the defense's requested jury instruction regarding cross-racial identification improperly singled out the eyewitness testimony.⁶⁸ The court further held that the cross-racial instruction was adequately covered by the general instruction regarding eyewitness identification.⁶⁹

Should Courts Permit Expert Witnesses to Testify on Factors Affecting the Risk of Mistaken Cross-Racial Identification?

Those who favor the admissibility of expert testimony argue that it is crucial to the deliberative process that jurors are educated on the potential errors in cross-racial identifications. Jurors are more apt to comfortably discuss racial differences without fear of discord in the jury room when they have received testimony from an expert considering the possible influence of racial differences as affecting the accuracy of the identification. Also, they argue that the possibility of error in cross-racial identifications is not within the ordinary knowledge of many jurors.⁷⁰

In *Brodes v. State*,⁷¹ the Georgia Court of Appeals stated that expert testimony would have aided the jury in evaluating the reliability of the identification because the expert would have testified about factors affecting the accuracy of the identification.⁷² The court suggested that those factors were highly relevant in the case, which involved cross-racial identifications by victims at gunpoint.⁷³ The court also stated that producing an expert was the only way to present the proffered empirical evidence to the jury.⁷⁴

On the other hand, in *State v. Coley*,⁷⁵ the Supreme Court of Tennessee held that expert testimony concerning eyewitness identification is per se inadmissible because the reliability of eyewitness identification is within the common understanding of jurors aided by skillful cross-examination and an appropriate jury instruction.⁷⁶ Also, the court held that Tenn. R. Evid. 702, requiring that expert testimony be admissible only if it "substantially" assists the trier of fact, requires "a greater showing of probative force than the federal rules of evidence or the rules of evidence from those states that have followed the federal rules, making the per se exclusion appropriate."⁷⁷ The court's recommended jury instruction, however, does not include race as a factor for the jury to consider.⁷⁸

Opponents of expert testimony argue that expert testimony is not needed on the cross-racial identification issue because it is not too complicated an issue and jurors are able to understand and apply the judges' instructions. Deborah Bartolomey, Deputy Attorney General in the Criminal Division of the New Jersey Attorney General's Office, argues that experts may be costly for defendants, confuse the jury rather than clarify the issues, and take up time.⁷⁹ A principal drawback of the use of expert witnesses is the lack of their availability, especially for indigent defendants.

Some courts prefer a cross-racial instruction to expert testimony: "We believe that the problem can be alleviated by a proper cautionary instruction to the jury which sets forth the factors to be considered in evaluating eyewitness testimony."⁸⁰ In *Cromedy*, the New Jersey court held that the defendant was entitled to a cross-racial jury instruction, but not entitled to expert testimony.⁸¹

Conclusion

In *Smith v. State*, the Maryland Court of Appeals in 2005 stated that given another set of facts, it may be appropri-

ate for a trial court to give a jury instruction on cross-racial identification. Defense counsel should consider requesting a cross-racial jury instruction in situations when the risk of a misidentification and a wrongful conviction are highest: (1) identification is a crucial issue in the case; (2) little or no evidence corroborating eyewitness evidence is presented; and (3) the circumstances raise doubts about the reliability of the identification.

A specific jury instruction on cross-racial identification, such as the proposed model instruction, sensitizes jurors to consider whether the fact that the defendant is of a different race than the identifying witness has affected the accuracy of the identification. Jurors are more apt to comfortably discuss racial differences with such an instruction. The proposed model cross-racial jury instruction draws upon various federal and state jury instructions, especially those in *Telfaire* and *Cromedy*.

Defense counsel in cross-racial identification situations need to find out how much contact and experience identifying witnesses have had with persons of a defendant's race. Some states, such as Indiana, require a preliminary showing of a risk that the witness may have been mistaken due to cross-racial factors.

Prosecutors will focus on the circumstances supporting the reliability of the eyewitness identification(s). They should also highlight the degree of contact and experience of the identifying witness with persons of the defendant's race, such as their residence in a mixed race neighborhood.

When loss of liberty and, possibly, the life of a human being are at stake, the additional safeguard of a jury instruction on cross-racial identification, such as the jury instruction proposed in this article, is an important tool to help protect against the heightened risk of eyewitness misidentification and wrongful conviction.

DNA exonerations resulting from work of the Innocence Project, supplemented by decades of scientific research, dramatically spotlight eyewitness misidentification as the leading cause of wrongful convictions in the United States. A high percentage of these cases involve cross-racial misidentifications. There is widespread consensus supported by a substantial body of evidence that persons are less able to recognize faces of a different race than their own. Cross-racial identifications are generally inferior to within-race identifications.

A jury instruction specifically tailored to safeguard against cross-racial identification errors should serve to enhance fairness and confidence in the criminal justice system.

¹ David E. Aaronson, MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY, Instruction, §2.57(B), Cross-Racial Identification of Defendant (LexisNexis, 3d ed., forthcoming 2008).

² See, e.g., ELIZABETH F. LOFTUS, JAMES M. DOYLE, & JENNIFER E. DYSART, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 103 (4th ed. 2007) ("It is well established that there exists a compar-

ative difficulty in recognizing individual members of a race different from one's own."); Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. APPLIED SOC. PSYCHOL. 972 (1988); Roy S. Malpass & Jerome Kravitz, *Recognition of Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOL. 330, 333 (1969).

³ See Platz & Hosch, *supra* note 2; Malpass & Kravitz, *supra* note 2, at 333.

⁴ See Sherri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984); see also Otto H. Macklin & Roy S. Malpass, *Racial Categorization of Faces*, 7 PSYCHOL. PUB. POL'Y & L. 98 (2001).

⁵ See E-mail from Professor Binny Miller, Director, Criminal Justice Clinic, Washington College of Law, American University (Oct. 2, 2007) (on file with the author).

⁶ See Jordan Abshire & Brian H. Bornstein, *Juror Sensitivity to the Cross-Race Effect*, 27 LAW & HUM. BEHAV. 471, 471 (2003).

⁷ See Johnson, *supra* note 4, at 982.

⁸ See Innocence Project, Fact Sheets, Eyewitness Misidentification and Facts on Post-Conviction DNA Exonerations, <http://www.innocenceproject.org> (last visited Jan. 22, 2008).

⁹ See *id.*

¹⁰ See Loftus, Doyle, & Dysart, *supra* note 2, at 105.

¹¹ See Malpass & Kravitz, *supra* note 2, at 330-34.

¹² See Loftus, Doyle & Dysart, *supra* note 2, at 103; see also Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3 (2001). This Article is not intended to provide a thorough analysis of the empirical studies relating to the accuracy of cross-racial identifications. For a more extensive analysis of these considerations, see, e.g., Gary Wells, *Eyewitness Identification: Systematic Reforms*, 2006 WISC. L. REV. 615 (2006); Sam R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005); American Psychology Association, Symposium Issue, *The Other Race Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decision Making*, 7 PSYCHOL. PUB. POL'Y & L. 1 (2001); John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identification*, 28 AM. J. CRIM. L. 207, 211 (2001); Siegfried Ludwig Sporer, *Recognizing Faces of Other Ethnic Groups: An Integration of Theories*, 7 PSYCHOL. PUB. POL'Y & L. 36, 39 (2001); Otto H. MacLin, M. Kimberly MacLin, & Roy Malpass, *Race, Arousal, Attention, Exposure, and Delay: An Examination of Factors Moderating Face Recognition*, 7 PSYCHOL. PUB. POL'Y & L. 134 (2001); Gary Wells, *Eyewitness Identification: I Noticed You Paused on Number Three*, 20 NOV. CHAMPION 11 (1996).

¹³ See Loftus, Doyle & Dysart, *supra* note 2, at 103.

¹⁴ See REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY 30 (Giannelli & Raeder eds. 2006).

¹⁵ See Terrence S. Luce, *The Role of Experience in Inter-Racial Recognition*, 1 PERSONALITY & SOC. PSYCHOL. BULL. 39, 40 (1974).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See *State v. Romero*, 922 A.2d 693, 700 (N.J. 2007).

¹⁹ 469 F.2d 552 (D.C. Cir. 1972).

²⁰ *Id.* at 555-56.

²¹ *Id.* at 557-60.

²² *Id.* at 561 (Bazelon, C. J., concurring).

²³ See, e.g., *United States v. Thomas*, 713 F.2d 604, 607-08 (10th Cir. 1983) (“[The Third and Tenth Circuits] have held that a cautionary instruction must be given when identification is the key issue in the case and the identification testimony is uncertain or qualified . . . [The First, Fourth, Eighth, and DC Circuits] have strongly urged the giving of such an instruction when identification is the main issue in a case and evidence of identification is uncertain or qualified, but have stopped short of saying that failure to give the instruction is reversible error in every case.”).

²⁴ Compare *United States v. Miranda*, 986 F.2d 1283, 1286 (9th Cir. 1993) (“Even where the only evidence is identification evidence, general instructions on the jury’s duty to determine the credibility of the witnesses and the burden of proof are fully adequate.”) with *United States v. Hodges*, 515 F.2d 650, 653 (7th Cir. 1975) (“We now adopt [the *Telfaire* instruction] as the required practice in this Circuit; and although it is not our intention to require that the *Telfaire* model be given verbatim, we hereby publish notice that we shall in the future view with grave concern the failure to give the substantial equivalent of such an instruction.”).

²⁵ 857 A.2d 1198 (Md. App. 2004).

²⁶ *Id.* at 1201-02.

²⁷ *Id.* at 1202.

²⁸ *Id.* at 1202-05.

²⁹ *Id.* at 1206.

³⁰ *Id.* at 1216, 1218.

³¹ *Id.*

³² See *Smith v. State*, 880 A.2d at 288, 300 (Md. 2005).

³³ *Id.* at 299.

³⁴ *Id.* at 300.

³⁵ CAL. CRIMINAL JURY INSTRUCTIONS NO. 2.92 (7th ed. 2003) (emphasis added).

³⁶ 154 Cal. App. 3d 79 (1984).

³⁷ *Id.* at 83.

³⁸ *Id.* at 89.

³⁹ See *State v. Long*, 721 P.2d 483, 492 (Utah 1986).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 492-93.

⁴³ *Id.* at 495.

⁴⁴ *Id.* at 494-95, n.8.

⁴⁵ New Jersey Model Criminal Jury Charges, New Jersey Identification Instruction: In-Court and Out of Court Identification, 2002 WL 32976451 (Revised Oct. 1999).

⁴⁶ 727 A.2d 457 (N.J. 1999).

⁴⁷ *Id.* at 459.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 460.

⁵¹ *Id.* at 466.

⁵² *Id.* at 467.

⁵³ *Id.*

⁵⁴ See, e.g., *State v. Dixon*, 787 A.2d 211 (N.J. 2001) (permitting cross-racial instruction after defense request); *State v. Robinson*, 754 A.2d 1153 (N.J. 2000) (endorsing charge enumerating several factors a jury may need to consider including cross-racial factors).

⁵⁵ See *State v. Romero*, 922 A.2d 693, 693 (N.J. 2007) (conclud-

ing that the trial judge did not abuse his discretion by denying a cross-racial jury instruction in a case involving a non-Hispanic Caucasian eyewitness and a Hispanic Caucasian defendant).

⁵⁶ *Id.* at 700.

⁵⁷ See *Commonwealth v. Jean-Jacques*, 712 N.E.2d 1150, 1152 (Mass. App. 1999); see also *Commonwealth v. Hyatt*, 647 N.E.2d 1168, 1171 (Mass. 1995) (“[T]he giving of [a cross-racial jury] instruction may be appropriate in the judge’s discretion.”).

⁵⁸ See, e.g., *Hyatt*, 647 N.E.2d at 1171; *Commonwealth v. Engram*, 686 N.E.2d 1080, 1082 (Mass. App. 1997).

⁵⁹ Aaronson, *supra* note 1.

⁶⁰ *Id.*

⁶¹ *United States v. Telfaire*, 469 F.2d 552, 561 (D.C. Cir. 1972).

⁶² Aaronson, *supra* note 1.

⁶³ See, e.g., *Lenoir v. State*, 72 S.W.3d 899, 905 (Ark. Ct. App. 2002).

⁶⁴ See *Garden v. State*, 815 A.2d 327, 341 (Del. 2003).

⁶⁵ See *State v. Cromedy*, 727 A.2d 457, 467 (N.J. 1999) (holding that the trial court’s failure to submit the defendant’s requested charge on cross-racial identification constituted reversible error, and stating that the purpose of a cross-racial instruction is to “alert the jury through a cautionary instruction that it should pay close attention to a possible influence of race”).

⁶⁶ See, e.g., *Murrell v. Indiana*, 747 N.E.2d 567, 573 (Ind. Ct. App. 2001); *Miller v. State*, 759 N.E.2d 680 (Ind. Ct. App. 2001) (affirming trial court’s denial to give the instruction absent a showing of a specific risk that the witnesses were mistaken due to cross-racial factors).

⁶⁷ 759 N.E.2d 680.

⁶⁸ *Id.* at 684.

⁶⁹ *Id.*

⁷⁰ See, e.g., *People v. Beckford*, 532 N.Y.S.2d 462, 465 (S. Ct. Kings Cty. 1988).

⁷¹ 551 S.E.2d 757 (Ga. Ct. App. 2001).

⁷² *Id.* at 759.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ 32 S.W.3d 831 (Tenn. 2000).

⁷⁶ *Id.* at 838.

⁷⁷ *Id.*

⁷⁸ *Id.* at 835 n.5 (citing *State v. Dyle*, 899 S.W.2d (Tenn. 1995) as providing the appropriate instruction on identification.).

⁷⁹ See Deborah Bartolomey, *Cross-Racial Identification of Testimony and What Not To Do About It*, 7 PSYCHOL. PUB. POL’Y & L. 247, 252 (2001).

⁸⁰ See *State v. Kelly*, 752 A.2d 188 (Me. 2000) (instructing the jury that it could consider whether race had any bearing on the reliability of the identification, but denying expert testimony on the basis that the testimony would not be helpful).

⁸¹ See *State v. Cromedy*, 727 A.2d 457, 467-68 (N.J. 1999).

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